SUPREME COURT OF THE UNITED STATES,

No. 284.

(To be used also in No. 233.)

THE STEAMBOAT M. BURNS, &c.,
Plaintiff in Error,

vs.

THOMAS MORRISON AND THOMAS F. McENNIS,
Defendants in Error.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF GEO. P. STRONG, ATT'Y OF DEFT'S IN ERROR.

This is one of eleven suits brought by defendants in error in the Circuit Court of St. Louis County, Missouri, to recover some ten thousand dollars due them for supplies furnished for the use of eleven steamboats, belonging to the St. Louis, Cairo & Johnsonville Packet Company, and running in the trade between St. Louis, Mo., and Johnsonville, Tenn.

These boats had been the property of a mercantile firm, residing and doing business in St. Louis, and were placed by them as stock in the Packet Company, which claimed to be a corporation, under a charter granted by the Legislature of Tennessee.

The boats, however, remained enrolled in the custom house at St. Louis, and most of the stockholders resided in the same city.

It appears from the record, page 25, that the defendants in error resided and were doing business, as merchants, in St. Louis, and that the accounts accrued there. The purchases were made through an agent employed by the Packet Company,

who had no connection with the boats, either as master or mariner. His whole time was spent in St. Louis, and whenever he purchased supplies, he designated the boat to which they should be sent. He also directed defendants in error to keep a separate account with each boat. [Record, page 26.]

The Boat Act of Missouri provided that the party furnishing supplies for the use of boats should have a lien for the price of them.

Defendants filed their petition or complaint in the St. Louis Circuit Court against each of these boats, and they were attached. Notice was given to the owners by publication, and they appeared and defended the suits.

After being twice taken to the Supreme Court of the State, final judgment was rendered in favor of defendants in error for the full amount of their claims, and the case against the M. Burns was brought to this Court by writ of error, as a test case, the owner of the plaintiff in error having, after the first trial, and after the case had been once passed upon by the Supreme Court of Missouri, filed an amended answer, denying the jurisdiction of the State Court, on the ground that the contract was within the exclusive jurisdiction of the United States District Court. In other words, that it was a case of a maritime lien, of which the District Court had exclusive cognizance. [Rec. page 31.]

There is little or no disagreement in reference to the facts of the case. And although the record in some respects may seem confused, owing to the fact that entries affecting the other boats are sometimes embraced in the entries respecting the Burns, the case is made sufficiently clear to show the real matter in controversy.

The question which this Court is now called upon to adjudicate, is this: *Does the furnishing of supplies to a vessel in her home port create a maritime lien, and bring the case within the exclusive cognizance of the United States Courts having admiralty jurisdiction?*

Until the decision of the case of "The Hine vs. Trevor," reported in 4 Wallace Rep., 555, decided by this Court in April, 1867, the doctrine seems to have become pretty generally established that no maritime lien existed for supplies furnished a vessel in her home port, and that since the repeal of Rule 12, in admiralty, the United States District Court had no jurisdiction to enforce a contract for such supplies.

The following cases are referred to in support of this proposition:

The General Smith, 4 Wheaton Rep., 438.
The Steamer St. Lawrence, 1 Black, 522.
Maguire vs. Card, 21 How., 248.
The New Orleans vs. Phebus, 11 Peters, 275.
Pratt et al. vs. Reed, 19 Howard, 359.
People's Ferry Co. vs. Beers, 20 Howard, 400.
Roach et al. vs Chapman et al., 22 Howard, 129.

In the case of the People's Ferry Co. vs. Beers, Justice Catron, in delivering the opinion of the Court, referring to the claims of material men, for labor, and supplies, says: "Where the owner is present, no lien is acquired by the material man, nor is any where the vessel is supplied or repaired in the home port." * * * "It was a contract made on land, to be performed on land." Referring to the fact that District Courts

have sometimes entertained jurisdiction *in rem* in such cases, he says: "Thus far, however, in our judicial history, no case of the kind has been sanctioned by this Court."

In Maguire vs. Card, the Court says: "We have determined to leave all these liens, depending upon State laws, and not arising out of the maritime contract, to be enforced by the State Courts."

The latest case on this subject is one decided at this term of the Court, which seems to cover the whole ground:

The Belfast, 7 Wallace, 624.

It may be doubted whether the decision in the case of Hine vs. Trevor advanced, or was intended to advance, any doctrines at variance with the rulings to be found in the cases just cited. It is true that it rather startled the profession, and perhaps the Courts in some parts of the country, by its clear and authoritative enunciation of the doctrine, that to the Federal Courts belonged the exclusive cognizance of all questions of admiralty and maritime jurisdiction, except where a common law remedy could be applied through the State Courts. But the same doctrine may be found intimated or uttered with more or less clearness in several of the decisions of this Court, previously made:

Martin vs. Hunter, 1 Wheaton, 337.

Slocum vs. Mayberry, 2 How., S. C. R., 9.

Waring vs. Clark, 5 Howard, 451.

The Genessee Chief, 12 Howard, 457.

Steamboat Magnolia, 20 Howard, 296.

These cases clearly announce the doctrine, which may be considered as finally settled in the Hine case, that *in all matters of maritime liens,* the United States District Court has *exclusive* original jurisdiction under the Federal Constitution, and that this jurisdiction is derived from the constitutional grant; the Judiciary Act of 1789, and subsequent Acts of Congress, being merely designed to carry into effect the constitutional provisions.

And while in the application of these principles, some cases may have been brought within the range of this exclusive jurisdiction of the Federal Courts which had before been held to be cognizable in the State Courts, yet it does not seem to have formed any part of the intent of this decision to enlarge the admiralty jurisdiction of the Federal Courts, or to deny to the State Courts jurisdiction in the case even of maritime contracts, where no maritime lien existed.

Influenced by this decision, the Courts of several of the States, which had previously gone far in their encroachments upon the legitimate and exclusive jurisdiction of the Federal Courts in matters strictly of admiralty cognizance, seem now inclined to rush to the other extreme, and to deny to the State Courts jurisdiction of all matters having any relation, however remote, to commerce and navigation.

According to this theory, if a baker furnishes a loaf of bread, or a grocer sells a barrel of sugar, at his store, in the city of St. Louis, to the owner of a vessel lying at her home port, to be used upon such vessel, he must resort to the Admiralty Court to enforce the payment of his bill, or proceed in the State court by an action of assumpsit.

This construction of the case of Hine vs. Trevor denies to the States all power to provide for an attachment, or a proceeding *in rem* to enforce such a contract.

The authorities are numerous which hold that there is no maritime lien in such cases, and, therefore, if an Admiralty Court has cognizance of them at all, it would only be by an action *in personam.* Yet the advocates of the new doctrine contend that wherever the Admiralty Court has jurisdiction at all, even though it were only by an action *in personam,* such jurisdiction must be exclusive.

This would directly contravene an express provision of the

Judiciary Act of Sept. 24, 1789, which saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

There are many cases where a maritime lien exists which can only be enforced in an Admiralty Court, in which a common law action of assumpsit, trespass, &c., could unquestionably be maintained. For all supplies and repairs done or furnished in a foreign port; for work and labor, as seamen, or as salvors, and in numerous other instances, a common law action *in personam* against the owners of the vessel, would undoubtedly lie. And for the same causes an action *in personam* would lie in the Admiralty Court.

Hence it follows conclusively, it seems to me, that it was not the design of the Act of 1789 to confer exclusive jurisdiction upon the Admiralty Courts in actions *in personam*, even though they may arise in contracts strictly maritime, and in contracts by which a maritime lien is created. It is only when a maritime lien is to be enforced by a proceeding *in rem* that the jurisdiction of the Federal Courts becomes exclusive.

In cases where there is no maritime lien, if the Federal Courts have jurisdiction at all, it is concurrent only with the State Courts.

Such is believed to be the tenor of the decisions of this Court. Justice Miller, in pronouncing the decision of the Court in the case of the Hine, makes use of this language:

"If the facts of the case before us in this record constitute a cause of admiralty cognizance, then the remedy, by a direct proceeding against the vessel, belonged to the Federal Courts alone, and was excluded from the State tribunals." [The Hine vs. Trevor, 4 Wallace, opinion on page 569.]

From this extract it would seem that the Court, in asserting the exclusive jurisdiction of the Admiralty Courts, confines the claim to those cases where "the remedy, by a direct proceeding against the vessel," could be enforced in the Admiralty Court.

It is contended on behalf of plaintiff in error that although there may be no maritime lien in the case of supplies furnished for a vessel in her home port, yet the States are prohibited from conferring any lien to be enforced by attachment, or a proceeding *in rem* in such cases, and that in the case at bar the State Court had no jurisdiction, because the boat was seized, and a lien created by statute was enforced.

To this I reply, that the admiralty jurisdiction of the Federal Courts is conferred by the Federal Constitution and the Judiciary Act of 1789, and is determined by the subject matter of the controversy, and no action of a State Legislature or of a State Court can in any manner enlarge or restrict this jurisdiction. If no maritime lien exists to enforce a contract for supplies furnished to a vessel in her home port, according to well established principles of admiralty jurisprudence, then an Admiralty Court has no exclusive jurisdiction of such contract. I might say, no jurisdiction at all in such a case.

How then can an attempt to create a lien in such cases by State enactments, not only confer jurisdiction upon the Federal Courts, but make that jurisdiction exclusive?

The scope of this argument for plaintiff in error would seem to be, that a State Legislature, by attempting to do what it is claimed it has no power to do, namely, to create a lien for supplies furnished a vessel in her home port, not only fails to secure that end, but does in fact accomplish the much greater task of creating a *maritime lien*, and conferring exclusive jurisdiction upon the Federal Courts, where no such lien, and no jurisdiction whatever, existed before.

The subject of the distinction between contracts which may be considered maritime, and those which are not maritime, or more strictly speaking, those which fall within the range of the exclusive admiralty and maritime jurisdiction of the Federal Courts and those which do not, was fully considered by this Court in the case of the Belfast, reported in 7 Wallace Rep., page 624.

And such a conclusion appears to have been reached and distinctly announced as ought, we think, to end the controversy in this case.

Although the question before the Court in that case was, whether the contract of affreightment, entered into in the case of a shipment from one port in a State to another port in the same State, was within the exclusive admiralty and maritime jurisdiction of the Federal Courts, the case required and received a careful and thorough investigation as to the foundation and extent of this exclusive jurisdiction; and the conclusion arrived at and announced by the Court in its decision was, that while such a contract was the subject of the exclusive jurisdiction of the Federal Courts, the matter of claims for supplies

furnished to a vessel in her home port, building contracts, etc., were not the subjects of such jurisdiction, but were left to the control of the States, to be enforced by such remedies as might be considered adequate and appropriate.

The language of the Court is as follows:

"Authority does not exist in the State Courts to hear and determine a suit *in rem* in admiralty to enforce a *maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port;* and in respect to such contracts it is competent for the States, under the decisions of this Court, to create such liens as their Legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

This decision having been made at the present term of this Court, would seem to settle the case at bar. Unless the language used is held to be an unmeaning dictum, there would seem to be no room for further controversy. I do not find a single case, originating since the repeal of the 12th Rule, in which this Court has undertaken to enforce a contract for supplies furnished to a vessel in her home port; while the numerous cases cited go to establish the doctrine contended for by the defendants in error in this case, that the Federal Courts have neither exclusive nor concurrent jurisdiction to enforce such contracts; that the whole matter is within the jurisdiction and control of the States, through their Legislatures and Courts, and that they have full power to provide a remedy, either by a personal action or a proceeding *in rem.*

It would seem as though a bare statement of the case at bar were sufficient to show that it does not come within the range of the admiralty and maritime jurisdiction of the Federal Courts, as conferred by the Federal Constitution and regulated by the Judiciary Act of 1789.

The record presents the simple case of a merchant in St. Louis selling goods to a corporation located in the same place, through an ordinary purchasing agent, which goods were sent on board of nearly a dozen different steamboats belonging to the corporation, which boats were at the time at their home port, in the same city where the goods were furnished and the owners resided.

While it is true that these goods were purchased and sold to be used by these boats, it is equally true that the contract which defendants in error are seeking to enforce was performed on their part, and the cause of action complete, the moment the sale and delivery were made. The agent might have carried or sent these goods to the private residences of the stockholders of this corporation, or made any other disposition of them which his employers might choose to direct. There was nothing in the contract of purchase and sale that necessarily partook of the nature of a maritime contract.

It may be said that this became a maritime contract when the goods were sent on board these boats, and that they were necessary to enable them to proceed on their next trip.

So would similar supplies be necessary to the captain and clerks, at their residences in the city, while the boats remained in port, that they might have health and strength to perform their maritime duties upon their next voyage.

We submit that contracts must have a more intimate and necessary relation to the business of navigation to constitute maritime contracts, within the exclusive admiralty and maritime jurisdiction of the Federal Courts.

It is alleged in the amended answer of plaintiff in error, and not denied, that the goods "were furnished on the faith of the lien, as given by the statute, as well as on the personal credit of the owner." [Record, page 31.]

This is all very true, but there is a broad distinction between a lien created by statute law and a *maritime lien*. The one is the creature of the statute, and only exists by virtue of the statute. The other exists independent of any statute, and has its origin in the nature of the contract or duty itself.

This maritime lien forms the distinctive characteristic of all that class of actions or contracts which are the subjects of the exclusive admiralty and maritime jurisdiction vested in the Federal Courts.

The statute may give a lien which a State Court will enforce. It can not create a maritime lien, or confer jurisdiction upon an Admiralty Court.

The case of the steamboat M. Burns vs. Reynolds & Aiken, No. 233, is, by agreement of counsel, to abide the decision in this case, and to be considered as submitted with it, upon the same briefs and arguments.

There is nothing peculiar in the case, except that it proceeded in the Circuit Court below without pleadings, being filed as a simple claim after the Court had taken jurisdiction of the boat. The only mode in which the question of jurisdiction is raised is by an instruction asked on behalf of plaintiff in error, to the effect that the Circuit Court had no jurisdiction of the suit, and that jurisdiction of such causes was exclusively in the Courts of the United States. [See Record in No. 223, page 15.]

The defendants in error in both these cases submit that there is no error in the records and proceedings therein, and that the judgments of the Supreme Court of Missouri ought to be affirmed.

GEO. P. STRONG,

Att'y of Defendants in Error.

58-59

IN THE Missouri

SUPREME COURT OF THE UNITED STATES.

BRIEF FOR

PLAINTIFF IN ERROR.

THE STEAMBOAT M. BURNES *vs.* THOS. MORRISON AND THOS. F. M. ENNIS.

SAME *vs.* JOS. T. REYNOLDS *and* JAS. AIKEN.

JOHN H. RANKIN,

FOR PLAINTIFF IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

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JOHN H. RANKIN,

FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR, AS TO THE MANNER AND FORM OF THE WRIT OF ERROR.

THE STEAMBOAT M. BURNES, *her tackle, etc.*,
Plaintiff in Error,
vs.
THOS. MORRISON and THOS. F. M. ENNIS,
Defendants in Error.

SAME
vs.
JOS. T. REYNOLDS and JAMES AIKEN,
Defendants in Error.

STATEMENT OF THE CASE.

It is submitted that the writ of error in the present case is taken in the name of the proper party. This is not an admiralty case, nor is the practice here to be governed by the tests applicable to admiralty practice. It is true that we have contended, and still contend, that the State courts exercised, in taking cogni-

zance of this case, jurisdiction over an admiralty contract and used admiralty process to enforce the contract. But in doing this the State courts do not, in all particulars, follow the admiralty methods and adopt its practice. The statute of Missouri is based on the general admiralty law, but it is not itself admiralty law. It would be absurd to pretend so. Sales under it give only a qualified title; and thus it lacks an element, the want of which in itself makes the law peculiar, anomalous, *sui generis*. But the law on its face is anomalous. A boat or vessel under the act may bring a suit, and be the plaintiff in the case. What is there in admiralty to answer to this? The vessel, it is true, must act through an agent, and the agent would make the affidavit to the complaint; but the agent would not be plaintiff, nor a party to the record, any more than the secretary of a corporation would be a party to the record because the corporation could not make the affidavit. It is *the vessel itself* which is the plaintiff where she sues under the statute, and *the vessel itself* which is the defendant where she is sued under the statute. When the owner or agent appears, he appears not as a claimant in admiralty appears, as an actor, but "on behalf of" the boat or vessel, which is itself the actor, the suit being "in the name of such boat or vessel." The exact words of the statute (Sec. 44, on page 314 of Vol. 1) are: "*Any boat or vessel* may institute suit, *in the name of such boat or vessel*, *through* the owners, master, agent, or consignee there-

of," &c. This is precisely as a corporation sues, through its president or its secretary; that is to say, the action is taken, the movements are made, by the agent, but the agent is no party to the record. He is nowhere known or recognized in the action. It is the corporation which sues, and which brings the writ of error. So, unless the words of the statute are to be entirely disregarded, must it be with the boat or vessel. She is made, by the very words of the law, a legal entity for certain purposes and within a certain limit. The law, *in its very terms*, must be complied with. The analogies of the admiralty law, whether close or remote, can not overrule, cannot nullify the words of the statute. To the courts of the State these are imperative.

Even if it could be claimed that the statute was open to construction, and that, in spite of what has been urged, the admiralty practice might have been followed, a claimant, or at least an owner or agent, might have appeared as the *motor*, the party endowed with life and power to act, and that the pleading could have been as it is in admiralty the claimant's pleading, and not that of the inanimate thing; the practice has otherwise settled the matter under our boat law. The reports of our Supreme Court may be searched in vain for any mention of *a claimant*, as known in admiralty. The titles of the cases, which in the late volumes are always given in full, read as the title in the present case reads, not as admiralty titles read. It is

not (as in 21 Howard, 7, e. g.) The propeller Niagara, Ansel R. Bobb, and others, claimants and appellants, *vs.* Joseph H. Condes, but Bersie *et al*,. respondents, *vs.* The steamboat Shenandoah, appellant, 21 Mo. 18; Hayes *et al.*, plaintiffs in error, *vs.* steamboat Columbus, defendant in error, 23 Mo. 232; Thomas Morrison *et al.*, respondents, *vs.* steamboat M. Burns, appellant, 41 Id. 491, and so in every case without exception. Nowhere are the owners who appear for the boat, or, speaking more properly, through whom the boat itself appears as the only party defendant, the only appellant or plaintiff in error, nowhere are the owners made parties to the record. In some cases there is no personal party to the record on either side; as in steamboat Blue Ridge *vs.* Steamboat Time, 9 Mo. 642, where, though the decision was that on that cause of action, one steamboat could not sue another steamboat, it was by inference acknowledged that for freight and charges, one boat may, under the Missouri Act, be sole plaintiff and another boat sole defendant. In the decisions of the Supreme Court, the Court always speaks of the boat itself as the party appealing or pleading, not of claimants or owners, e. g., "the barge appeals to this Court;" "the defendant (the boat) pleaded, &c.;" "the defendant by her owners offered to prove;" "the demurrer was determined in favor of the boat;" "it appeared that the plaintiff contracted with the officers of the defendant," &c.; "the defendant has got off very well, better than she deserved," 10 Mo. 532; 12

Id. 570; Id. 261; 17 Id. 292. These are but few of the expressions which might be collected from the cases. Such expressions would never have fallen from the lips of an admiralty judge. They arise from the statute and its wording, and from the universal and accepted practice under it. At the first moment the boat appears, it appears as an actor, a motor, not as in admiralty, as a thing for which a claimant acts. The style of the case on the record is Thomas Morrison *et al.*, plaintiffs, *v.* The steamboat M. Burnes, defendant. The answer, marking the first appearance of "the adverse party" (these are the words of the judiciary act) commences, "Now comes the defendant by its owner," &c. Sometimes the name of the owner nowhere appears, sometimes it is not even stated that the boat appears "by its owner," but the answer proceeds, "Now comes defendant, and in answer to the petition alleges," &c.

If a long course of practice, justified by repeated decisions of the highest court of the State, has established the method used in this case, surely it ought not to be conclusive against us to say that in no admiralty case has the appeal or writ of error been in the name of the boat. The answer is, this is not an admiralty case. The proceeding is one under a special statute of Missouri, the like of which, in all its terms, is found in no other State. That statute, as construed by the Supreme Court, makes the boat itself the party to the record, and the active, moving party; the plain-

tiff in error or the appellant above, and the plaintiff or defendant (as the case may be) below. Suppose that this court is of opinion that the practice of the courts of Missouri under the statute has hitherto been erroneous, would it not, nevertheless, acquiesce in the State practice? Would it take a view which would, in fact, prevent a writ of error being taken in any case of a decision against a boat in the Supreme Court of our State? This court has said in State Bank of Ohio v. Koop, 16 Howard, 391, "the established construction of a statute of the State is received as a part of the statute;" in Pease v. Beck, 18 Howard, 598—"In all cases where there is a settled construction of the laws of a State by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry." If it has been the practice of our courts, sustained by the Supreme Court, to regard the boat itself as the defendant, to permit it to plead and act as though it were a corporation, to let it appeal and take writs of error, and if, by a long course of decisions, this mistake, if mistake it be, has been confirmed so that it is now regarded as the only correct method of proceeding, will this court make the plaintiff in error answerable for such a mistake? The record of the present case is made up in the courts of this State. It cannot now be altered. The boat is the defendant, and the only defendant throughout. Adolphe Heinecke, the owner, appears only as an agent of the boat; and

is no more a party to the record than the agent of any body corporate is such party. The final and most conclusive act in the court in which this case was tried is the judgment, and the judgment runs thus: "In the matter of the Steamboat M. Burnes: Now, at this day, comes *the defendant by its attorney*, and by leave of court files an amended answer to the *claim* of Morrison & McEnnis, and thereupon said *claimants* come and file a reply thereto and submit to the court their demand against said boat, and the said *claim* being fully proven and the validity thereof established, the court doth award judgment in favor of said claimants for the sum of $1413 17, and finds that their demand belongs to the second class of liens against said boat." The entry of the appeal allowed in the St. Louis Circuit Court to the Supreme Court is as follows: "Thomas Morrison v. Steamboat M. Burnes. Now comes *the defendant by attorney*, and files a bill of exceptions, and also an affidavit, for appeal, and on his (*sic*) motion, an appeal is allowed *it* to the Supreme Court from the judgment herein rendered. *It* thereupon files an appeal bond, which is approved."

Upon the judgment thus rendered and upon the appeal thus shown by the record from the Circuit Court, and upon the affirmance of that judgment in the Supreme Court, how should a writ of error be taken? The words of the judiciary act are, "the adverse party." This Court has decided that writs of error to this Court are governed by the principles and usages

of the common law; and that "it is very well settled in all common law courts that no one can bring up as plaintiff in a writ of error the judgment of an inferior court to a superior one unless he was a party to the judgment in the court below." Payne *vs.* Niles, 20 Howard, 219.

In admiralty, the claimant is a party to the Record. Everything, from the very style of the case downward, makes him so. The answer is not the answer of the boat. It is the answer of the claimant to the boat.—Wherever anything is to be done, any action to be taken, he and not the boat takes the action. Indeed, the boat has no name in the suit. She is not the defendant. She is never called so. There is no occasion to designate her by any name, for she is, throughout, a thing, and treated as such.

But, as under Missouri law and practice, admiralty rules have not been adhered to, what was to be the consequence? Since the writ of error must necessarily be sued out by a party to the record, a party to the judgment, it followed that an anomaly must be committed in making the boat itself the plaintiff in error. The whole record from the start could not be changed. The practice of the Missouri courts could not be altered, nor the statute repealed. It was apparent that in a certain class of cases under the statute, namely, those where the boat brings the suit—where, consequently, no art, no contrivance could, even at the outset, make *a person* also a plaintiff—the boat and the boat alone *must be* the plain-

tiff in error; and if in this class of cases, why not in other classes where the boat was defendant and where the Supreme Court had affixed a construction drawn, perhaps, from the first class, but certainly well established and long concurred in? State legislatures perform strange freaks, but surely parties ought not to be deprived of a decision on the merits of an important case, and that too in the tribunal of last resort, because of the strangeness of a law which they have literally followed as a law, but which they are seeking to have set aside as being no law at all. If it be a law, they ought not to suffer for literally adhering to it; if it be no law, it should be declared such, and an end should be put to its anomalies.

JNO. H. RANKIN,

For Plaintiff in Error.

Mr Justice Clifford

THE STEAMBOAT M. BURNS,
Plaintiff in Error,
No. 59.] vs.
THOMAS MORRISON, ET AL.,
Defendants in Error.

Supreme Court of the United States, December Term, 1869.

SAME
No. 58.] vs.
REYNOLDS & AIKEN.

Supreme Court of the United States, December Term, 1869.

Supplemental Brief for Defendants in Error.

Having had no opportunity to see the brief of plaintiff in error when my former brief was prepared, the following additional arguments and authorities are respectfully submitted:

The jurisdiction of the Courts of the United States in Admiralty is wholly derived from the grant contained in the Federal Constitution, and is distributed and regulated by the Judiciary Act of 1789. It can neither be enlarged nor restricted by State or by Congressional legislation.

The St. Lawrence, 1 Black, 522.

The construction of the language in which the grant of this jurisdiction is clothed must be that which the framers of the Constitution designed it to have when they used the language.

As the American colonies had been governed by the laws of England, modified only in some particulars to suit the peculiar wants and circumstances of these colonies, the framers of the Federal Constitution may well be supposed to have intended, when they used the terms, "admiralty and maritime," to confer jurisdiction over just that class of causes or actions which had been understood and held to be embraced in those terms by the admiralty courts of England prior to 1787.

While it is true that the maritime code was, in large part, derived from or framed by the Continental powers, and took its forms and many of its principles mainly from the civil law, it was only as it had been engrafted upon the English system that it was recognized as a system to be adopted for the regulation of maritime affairs in the new world. It may well be doubted whether it ever entered into the thoughts of those who framed the Federal Constitution that the jurisdiction of these maritime courts would ever embrace such an extent of territory as it is now held to reach. But by a singular prescience they used terms which, in this as in other cases, have proved appropriate to protect the varied interests of a nation whose territory and whose commerce have attained an extent and magnitude that never entered into the conception of the most visionary among them. But with all this comprehensiveness of language, it can hardly be contended that they had any conception of subjects which were to be brought within the jurisdiction of the Federal Courts, other than such as they understood to be embraced in the admiralty jurisdiction of the maritime courts of England, before that jurisdiction was seriously restrained through the jealousy of the common law courts.

It was contended in the earlier days of the Republic that the limit of tide-waters adopted and still adhered to in England was the limit of admiralty jurisdiction in this country, and this view was sustained by repeated decisions of this Court. But recent decisions have adopted a more sensible rule, and one perfectly consistent with the reason

and principle upon which the tide-water limitation was adopted in England. And that is, that admiralty jurisdiction extends to all the navigable waters of the United States, which is really the limit in England, as navigation there seldom or never extends beyond the ebb and flow of the tide.

The tug Jas. E. Eagle, recently decided but not yet reported.
Waring vs. Clarke, 5 How, 441.
The Genessee Chief, 12 How, 296.
The Magnolia, 20 How, 298.
The propeller Commerce, 1 Black, 574.
The Thomas Jefferson, 10 Wheat, 428.

The principal controvery in reference to the jurisdiction of the Federal Courts has taken place respecting the locality over which it extended, rather than as to the contracts embraced within it.

For a long time there was an attempt, partially successful, to restrain this jurisdiction within the ebb and flow of the tide, and to exclude it from any territory within the limits of a county.

As to the subject matters to be brought within this jurisdiction, until recently it was claimed and admitted that they were principally such as concerned the commerce between different States, or between our nation and foreign nations, and that contracts made and to be executed within the same State, even when of a strictly maritime character, were not within the jurisdiction of the admiralty.

But the recent decisions in the cases of Hine vs. Trevor, 4 Wallace, 555, and The Belfast, 7 Wallace, 624, seem to deny any such distinction, and to hold that maritime contracts, that is, those to which a lien upon the vessel is attached by the maritime law, are exclusively cognizable in the Federal Courts.

So far, however, as this exclusive jurisdiction, growing out of the nature of the contract, is concerned, I think it will be found limited to that class of cases in which a *maritime lien* exists. Wherever, by the maritime law, a lien upon the vessel attaches to the contract as a security for its enforcement, there is a case of "*admiralty and maritime jurisdiction.*"

In a recent work on "*Admiralty and Prize*," by Roberts, the characteristics of those contracts to which a maritime lien is attached, are noted with much clearness; and the reasons upon which this lien is founded are fully set forth, with numerous authorities to sustain the positions taken.

By reference to these it will be found that most of the contracts out of which a maritime lien arises are those which a master is compelled to make in a foreign port, to enable him to prosecute his voyage; and to aid him in making these contracts, where perhaps neither he or his employers are known, the maritime law authorizes him to pledge the ship for their fulfillment. Sometimes this is done by a bottomry bond, or other solemn instrument, executed with all due solemnity. Sometimes it is done by a simple contract, without any express pledge of the ship. In the latter case, the maritime law attaches the lien, as an incident to the contract itself. Of the latter class, is a

simple contract for supplies or repairs in a foreign port. But it is not every contract for supplies, even in a foreign port, that creates a maritime lien. There are certain conditions precedent to the existence of any maritime lien for the security of these contracts. They must be "entered into by the master *in a foreign* port, as the authorized agent of the owners, for their benefit, and not his own, in a time of distress or necessity."

When thus made, "these contracts have the effect (and are so designed) to assure and guaranty to a lender repayment of the money paid for repairs, or advanced for the ship's use, at the master's request, just as much as do bottomry bonds assure an obligee, or holder of this latter instrument. In both, the elements, ingredients or prerequisites are substantially the same. The security is similar; and though these simple contracts for repairs and necessaries are less formal in their construction and executions, yet both aim at the same common object—*the completion or prosecution of a temporarily suspended or interrupted voyage*, and are impressed with the like legal effect and character; that is, the ultimate security and repayment of a lender, who shall assume to advance the moneys required for relief.

Notwithstanding the absence of all formality, such contracts, when duly made by the master, upon his own or his owners' credit, and as their authorized agent, *under the pressure of necessity, for the purpose of continuing or completing the ostensible object of an unfinished maritime adventure*, create a tacit hypothec or lien upon the vessel, and are legally obligatory upon the owners personally."

Roberts on Adm'ty and Prize, pp. 199, 200.
1 Conk. Ad., pp. 25, 77, 78.
The Gen'l Smith, 4 Wheat., 438.
The St. Jago de Cuba, 9 Wheat., 409.
The Aurora, 1 Wheat., 96.

Again, Mr. Roberts says: "By the concurrence of both English and American authorities, as well as by the general maritime law, this proposition is universally sanctioned, as I think, that a master may, *in a foreign port*, procure necessaries proper for completing the voyage, *and for necessaries so furnished* the furnisher, etc., * * * upon the return of the ship to the home port, shall, by the maritime law, have a pledge, privilege, hypothec, or lien on the ship for the payment of *such necessaries so furnished*. * * * * This proposition is applicable to, and embraces all foreign vessels.

Ib., p. 208.

"These contracts were originally cognizable in the admiralty courts of England, prior to the reign of Charles II.; but this jurisdiction was denied to them by legislation, and by the interference of the common law courts during and subsequent to that period.

It has, however, been restored by subsequent acts of Parliament. In 1841, by the 3 and 4 Vic., ch. 65, sec. 6, jurisdiction was expressly conferred upon the High Court of admiralty, "to decide all claims for necessaries supplied to any foreign or sea-going vessel, and enforce payment" thereof. * * * *

Ib., 220.

"Notwithstanding this want of uniformity in British legislatures and courts, parties, both in England and the United States, are now substantially placed upon the same footing, so that if necessaries shall have been furnished, *in a foreign port*, to a master, *in an emergency*, acting within the scope of his implied authority, the person furnishing such supplies will thereby acquire a lien upon the ship as a

security therefor, unless one or two contingencies shall, upon proof, appear: either that the supplies *were furnished upon personal credit;* or other waiver of the legal lien.

"When either of these facts are made to appear in proof, it will constitute a valid defense, in a suit for necessaries."

Ib., 210.

These principles, applicable to and controlling proceedings upon contracts for necessaries and supplies, are fully sustained by authorities both in England and in this country.

In addition to cases cited on page 3 of Brief, defendants' counsel refers to the following:

The Desdemona, Swaby, 158.
The Wataga, Ib., 165.
The N. R. Gosfabrick, Ib., 344.

In this case, Dr. Lushington held that money advanced for necessaries for a foreign ship was not within the 3 and 4 Vic., ch. 65, sec. 6, and that "the Court had no original jurisdiction of the subject matter," and dismissed the libel.

The Perla, Swaby, 353.
The Alexander, 1 W. Robinson, 346.

In this case, it was held that the libellant must show that the supplies furnished a foreign ship were necessary.

To the same effect is *The Sophie*, 1 W. Robinson, 368.

These essential elements of a contract for supplies, out of which a maritime lien arises, and of which the admiralty courts of the United States have exclusive cognizance, are entirely wanting in the cases at Bar, and in every other case where supplies are furnished to a vessel in her home port.

There is no urgency in the case. The supplies are not obtained by the master, in a strange or foreign port, where he and the vessel's owners may be supposed to be without means or credit, upon the faith of this maritime lien upon the ship. They are not necessary, or apparently necessary, to the completion of a voyage already commenced.

The record shows that these supplies were furnished, not to the master, but to the owners, a corporation running an extensive line of boats and making their purchases through agents having no connection with the boats, but residing upon land.

There was no emergency in the case. No voyage had been commenced. The owners and the vessels were at home. Whatever credit the owners had in any part of the world, they must be supposed to have had where they resided and were known.

The supplies were not furnished upon the faith of any *maritime* lien, for by the authority of this Court, and nearly every other admiralty court in the country, the defendants in error were assured that no such lien existed.

They were furnished, in part, upon the faith of a lien created by the Legislature of Missouri; a lien attaching to the contract, whether made by the master, agent, servant or owner, without any reference to the necessities of the vessel or to any voyage she might contemplate.

It may be contended that, by the maritime law as administered upon the Continent, where the civil law predominates, material men have a lien upon the vessel for repairs and necessary supplies.

But the civil law, as such, has never been adopted as the law of the land, either in England or America.

Many of its admirable principles have been engrafted upon our system; but in their application, they have been limited to courts of special jurisdiction, and to causes of a peculiar nature.

In some of its features, the civil law was justly regarded with jealousy by our English ancestors, and it is not a mat-

ter of surprise that a people jealous of the right of trial by jury should seek to restrain, within the narrowest limits consistent with the interests of commerce, a system of jurisprudence that denied to litigants that inestimable safeguard of the rights and liberties of the citizen.

From this feeling, more than from any narrow-minded prejudices against the admiralty, it is not improbable that much of this controversy between the common law courts and the courts of admiralty arose.

Whatever may have been the cause, it is certain that, for more than a hundred years prior to the adoption of the Federal Constitution, the jurisdiction of the Court of Admiralty, in matters of supplies to a British vessel in a British port, had been abandoned. Sir Leoline Jenkins, in the seventeenth century, in a report to the King, claims this as a part of the ancient jurisdiction of the admiralty.

But Lord Stowell, in The Neptune, 3 Hagg, 128, commenting upon this report says: "In spite, however, of this reasoning and of the ancient practice, it cannot be denied that the Admiralty court, whenever it may since have allowed a proceeding by material men against the ship, has been prohibited; and higher considerations of public policy, and the interests of commerce generally, may have more than counterbalanced the reasons urged by Sir Leoline Jenkins on behalf of this class of persons, so far, at least, as the ship itself is concerned."

And his decision, that such a claim might be satisfied out of the "remnants and surplus," was, on appeal, overruled by the Judicial Committee of the Privy Council. 3 Knapp, p. 94.

From these considerations, it would seem hardly possible, certainly not very probable, that the framers of our Federal Constitution, could have intended by the use of the terms "admiralty and maritime jurisdiction," to have conferred jurisdiction of a claim for supplies to a domestic vessel at her home port, when they knew that for more than a hund

years, at least, the Admiralty Courts of England had not regarded such claims as within their jurisdiction.

It is moreover a speaking fact, that while the British Parliament has, by comparatively recent legislation, restored to the Admiralty so much of its ancient jusrisdiction as was deemed essential to the protection of the vast and extended commerce which is so intimately connected with the growth and prosperity of the British Empire, and has, thereby, as Mr. Roberts says, "placed parties both in England and the United States, substantially upon the same footing," yet I have found no British statute which allows a claim for supplies to a domestic ship to be adjudicated in a Court of Admiralty.

The commissions to the Governors of the American colonies, as Vice-Admirals, have sometimes been relied upon as furnishing evidence that the framers of the Federal Constitution did not derive their ideas of the nature and extent of Admiralty jurisdiction from the practice of the Admiralty Courts of England in the 18th century.

A careful examination of these commissions will show that they would be a very unsafe guide in interpreting the Admiralty powers of the Federal Courts. They embrace a range of subjects that never were, before or since, within the Admiralty jurisdiction of any Courts.

Roberts, p. 19.

That these commissions were not regarded as furnishing the test of what constituted admiralty and maritime jurisdiction, is shown by the fact that New York adopted the 13 Richard, 2d. Bee's Adm. Ch. 10. p. 91.

And in the case of the brig Hannah and the General Knox, decided in Pennsylvania in 1781, it was held that a carpenter could not sue in admiralty for his wages for building a ship.

Bee's Rep. 419.

The same doctrine was held in South Carolina, in 1786.
Bee, 433.

The only foundation for jurisdiction of causes arising from such claims, ever relied upon by the Federal courts, was the municipal law of the State where the supplies were furnished. Since the 12th rule in admiralty was rescinded, it is believed no proceeding in rem for such a cause has been allowed in the Federal courts.

Prior to that, whenever such jurisdiction has been sustained, it has been upon the express ground that the local law gave a lien.

The General Smith, 4 Wheat. 438.
Peyroux vs. Howard, 7 Pet. 324.

By the General Admiralty Law, as it is now administered both in England and in this country, it is believed that no such lien exists.

Dr. Browne says:

"Notwithstanding all these authorities and arguments, it seems now settled that the ship can not be hypothecated at home before the voyage commences, and that no person can sue in the admiralty for work and labor done in port before the voyage begins, or for necessaries sold for the ship's use before she sails."

2 Browne's Civil and Adm. Law, p. 80.

"No lien is ever implied from contracts made with the owner in person."

Conk. Adm. p. 80."

To the same effect is the case of the People's Ferry Co., vs. Beers, 20 How. 400.

The N. J. St. Nav. Co. vs. the Merchants Bank, 6 How. op. on pps. 390, 391.

So in the case cited by plaintiff's counsel, the Kinnie Am. Law Register of Aug. 1869, p. 470; the District Court of New Jersey held that a party furnishing supplies to a vessel in her home port, has no lien "which a Court of Admiralty can either recognize or enforce."

The same doctrine is announced in The Belfast, 7 Wal. 624. 4 Wall The St Lawrence 1 Black 527, 531,

Not a single case has been found in which the contrary doctrine has been held, so far as my examination has extended.

The only liens which an admiralty court can recognize or enforce, according to the recent decisions of this court, are *Maritime Liens*.

In the Belfast, 7 Wal, p. 642, the court remarks, "wherever a *maritime lien* arises, the injured party may pursue his remedy, whether for the breach of a maritime contract, or for a marine tort, by a suit in rem, or by a suit in personam at his election.

Among the examples cited by the court, to illustrate this proposition, is this, p. 643;

"Material men also, who furnish materials or supplies for a vessel in a *foreign* port, or in a port other than a port of the State where the vessel belongs, have a *maritime lien* on the vessel as a security for the payment of the price of all such materials or supplies. They have such lien, because, upon the principles of the maritime law, such materials and supplies are presumed to be *furnished on the credit of the vessel*, and consequently they are entitled to proceed in *rem* in the admiralty court, to enforce the lien, but they are not compelled to do so, as they may waive the lien and bring their suit in personam, against the master or owners, as they are also liable as well as the vessel."

Citing the St. Lawrence, 1 Black, 529.

From these quotations it seems clear that this Cour holds that it is only in cases where a maritime lien exists that the suitor has his election between a proceeding in admiralty in *rem* or in *personam*, and a proceeding in personam at common law.

Where no such lien exists, no such election is provided for.

It is evident that in conferring upon the District Courts exclusive original cognizance in all causes of admiralty and maritime jurisdiction, saving to creditors, etc., a common law remedy, the Judiciary Act intended to embrace only those cases in which, upon the principles of admiralty and maritime jurisdiction, a maritime lien existed.

Where no such lien existed there seems to be no reason for supposing that the Federal Constitution or the judiciary act intended to interfere with the right of a State to provide a remedy by attachment or a proceeding in rem.

It is not done by conferring exclusive cognizance of such causes in the Federal Courts, for no "exclusive cognizance exists."

Where the Admiralty Courts have cognizance at all, in cases in which there is no lien, they can only proceed in personam, and it is admitted that the State Courts can also entertain suits in personam in the same cases, not by virtue of the saving clause in the Judiciary Act of 1789, but by virtue of such powers as are inherent in them as Courts of Justice, or as may be conferred upon them by the Constitutions and laws, under which they exist in the several States.

There is nothing, therefore, in the jurisdiction entertained by the Federal courts in this class of cases, which partakes of the nature of an exclusive jurisdiction.

Where a maritime lien exists at all, it does so from the nature of the maritime contract, and it is to enforce such a contract, out of which a lien for the security of its performance arises, from its own nature, that the remedy by process *in rem*, exists. This is the class of cases in which

this remedy is held to be exclusive in the Federal courts.

In reference to supplies in the home port, no such lien arises, unless by statutory provisions.

The right to process *in rem* against the vessel, does not grow out of the nature of the contract, as in cases of maritime liens. It is the creature of the statute. The whole proceeding is statutory, has no life or force outside of the statute; does not exist under or by virtue of maritime law, and cannot be enforced by the admiralty courts.

By what principle of reason, or authority of law, can it be claimed that the Federal courts have exclusive right to a process which they can not and will not issue, and to a remedy which they can not and will not administer?

I submit that it is to such an anomalous and contradictory position this court is now requested to come by the plaintiff in error.

The court is now asked to decide, not that the Federal courts can enforce a lien for supplies furnished in the home port of the vessel.

It is admitted they have no such power, but that the State courts are equally devoid of power to enforce such a lien. And more than that, that the States themselves are without power to confer such a lien, or to provide a court to enforce it.

It is believed that the decision in the case of the Belfast, 7 Wal., was designed to establish directly the contrary doctrine, and to hold that "in all cases where a *maritime lien* arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District courts of the United States," and by necessary implication, that where such a maritime lien does not arise, the jurisdiction and control, both of the contract and the remedy, are reserved to the State Courts. See op. 7 Wal. p. 646. Also, that while "State Legislatures have no authority to create a *maritime* lien, nor can they confer any jurisdiction upon a State court to enforce *such a lien* by a suit or proceeding *in rem* as practiced in the Admiralty courts, (Ib. p. 644,)

yet by necessary implication they have authority to create other liens, and to provide the remedy for their enforcement.

How, then, can the form of administering a remedy by a State court, in a cause in which a Federal court has no exclusive jurisdiction over the subject matter, and no jurisdiction of the remedy, authorize this court to deny the use of such remedy to the State courts?

It is contended by plaintiffs that the State of Missouri provides for process and proceedings similar to those adopted in the admiralty courts, and that for this reason, the causes now before this court having been commenced under this statute, can not be maintained in the State courts.

If this is so, where can they be maintained? Not in the Federal courts; they administer no such remedy to enforce a contract for supplies for a vessel in her home port.

Congress cannot provide such a remedy, for it is not within the range of the constitutional grant of judicial powers vested in the Federal courts.

If, then, the States can not provide it, we have the strange and anomalous instance of a wholesome remedy in a class of cases of frequent occurrence which neither the National nor the State governments are competent to furnish.

But the proceeding is not modelled after the forms used in admiralty. It is the common form ado
causes under the Code of Practice in fo
See Gen. Stat. of Missouri. [illegible] Practice Act.

There is the complaint, the attachment,
case of non-resident debtors, the day in
the issue, *triable by jury*, and the judgment.

The only feature wherein the process to enforce a State lien against a boat differs materially from an ordinary attachment against a debtor to enforce any contract, is that which allows a suit to be instituted against the boat by name.

Now, if the Federal Constitution permitted the District

this remedy is held to be exclusive in the Federal courts.

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By what principle of reason, or authority of law, can it be claimed that the Federal courts have exclusive right to a process which they can not and will not issue, and to a remedy which they can not and will not administer?

I submit that it is to such an anomalous and contradictory position this court is now requested to come by the plaintiff in error.

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It is believed that the decision in the case of the Belfast, 7 Wal., was designed to establish directly the contrary doctrine, and to hold that "in all cases where a *maritime lien* arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District courts of the United States," and by necessary implication, that where such a maritime lien does not arise, the jurisdiction and control, both of the contract and the remedy, are reserved to the State Courts. See op. 7 Wal. p. 646. Also, that while "State Legislatures have no authority to create a *maritime* lien, nor can they confer any jurisdiction upon a State court to enforce *such a lien* by a suit or proceeding *in rem* as practiced in the Admiralty courts, (Ib. p. 644,)

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If, then, the States can not provide it, we have the strange and anomalous instance of a wholesome remedy in a class of cases of frequent occurrence which neither the National nor the State governments are competent to furnish.

But the proceeding is not modelled after the forms used in admiralty. It is the common form adopted in all civil causes under the Code of Practice in force in Missouri. See Gen. Stat. of Missouri. p. 638 Practice Act. 1 Newberry 307.

There is the complaint, the attachment, the notice, as in case of non-resident debtors, the day in court, the reply, the issue, *triable by jury*, and the judgment.

The only feature wherein the process to enforce a State lien against a boat differs materially from an ordinary attachment against a debtor to enforce any contract, is that which allows a suit to be instituted against the boat by name.

Now, if the Federal Constitution permitted the District

Court to proceed against a boat by name to enforce such a contract, the State law would conflict with its provisions.

But how can a State law conflict with the powers vested in the Federal Judiciary, when it simply provides for a case which is confessedly not provided for in the Federal Constitution. If the Federal Constitution does not confer upon the Federal Courts the power to enforce a contract for supplies in a home port, by a proceeding *in rem*, that is against the boat, then the power to enforce such a contract, and to administer such a remedy is reserved to the States.

U. S. Const. Amendments. Art. 10,

There can be no conflict between the State and Federal Judiciary, while the former pursues its course in an orbit, diverse in every point from that which is prescribed for the latter. To make conflict possible, the State Court must trench upon some exclusive power which the Federal Court may lawfully exercise.

Art. 10 of Amendment to the Const. of the U. S.

The case of the steam propeller Kinnie, before referred to and cited by the plaintiff in error, so far from being an authority against the jurisdiction of the State court, furnishes a weighty argument in its favor. In that case, the vessel was libelled for seamen's wages, in the District Court of the United States, District of New Jersey. The Hoboken Coal Co. intervened for their own interests, and claimed to have a lien, by the law of New Jersey, for supplies furnished to the Kinnie in her home port, and asked to be allowed to defend against the libellants' claim, and to have its own enforced.

While the District Judge does undertake, in this case, to decide a question not in the case, to wit, that a State law

authorizing a proceeding *in rem*, for domestic supplies, was in conflict with the Federal Constitution, he does decide correctly the real point in the case, so far as the claimants were concerned, that is, that the intervenors, having no lien recognized in a court of admiralty, could not be heard in that court, either to contest the claim of the libellants or to establish their own. The language of the court is as follows (See Am. Law Register, August, 1869, Stm. Prop. Kinnie, on p. 477) :.

"The consequence is," says the Court, "that in cases of domestic ships, for supplies furnished at a home port, a lien created by a State law is one which a court of admiralty can neither recognize or enforce. Hence it follows that in this case, the Hoboken Coal Company have no standing in Court, have no right to intervene, either for their own interest or to contest the claims of the libellants, and that the testimony taken on their behalf must be stricken out." This is undoubtedly the true doctrine, deduced from the decisions of this Court, and I leave it for the learned Judge of the District Court of New Jersey to reconcile this conclusion and judgment in the case with what he states in other parts of his opinion, as to the constitutionality of the act of New Jersey creating such a lien.

If the admiralty court had no jurisdiction of such a cause, wherein does a State law, conferring jurisdiction in such cases upon the State Courts, conflict with any constitutional provisions establishing the jurisdiction of the admiralty courts?

If the proceeding against a boat, by name, stamped upon it some of the features of an admiralty proceeding, the provisions of the Missouri Statutes, authorizing a trial by jury, fully removed them.

I submit that the State cannot make a cause one of admiralty and maritime jurisdiction by simply adopting some of the forms of proceedings in admiralty causes.

The validity of the Statutes of Missouri was not decided in the case of the Victory, nor is it any where admitted in

that case that these Statutes, so far as they confer a lien for domestic supplies, are unconstitutional. On the contrary, the Court expressly refuses to consider the question. (See op. of Justice Miller.)

6 Wall., 384.

In the case of the Josephine (39 New York R., p. 19), the Court, in its opinion (from which three of the Judges dissented), seems to have lost sight of the distinction between causes, or contracts, in which a maritime lien arises, and where, consequently, the admiralty has jurisdiction by process *in rem* to enforce the lien, and those where no such maritime lien exists, and where the admiralty court has no jurisdiction at all to enforce any remedy, except by an action *in personam*, which it only holds in common with the State courts.

How it can be seriously contended that the right to a proceeding *in rem*, to enforce a local lien, is denied to the State courts, because such remedy is exclusively invested the admiralty courts in a different class of cases, while it is admitted that it does not belong to them, in the case of the local lien, is to me incomprehensible.

It is the case of an infraction by a State law of a provision of the Federal Constitution which no where can be found.

I submit that the decision of the Supreme Court of Missouri, sustaining the jurisdiction of the State court, is of equal authority with that of the Supreme Court of New York, denying such jurisdiction.

Conklin, in his United States Admiralty, p. 19, says: "But it is not every contract or service pertaining to matters transacted, even on tide waters, that is to be deemed, in any just sense, a maritime contract. It must pertain, also, to the business of commerce and navigation."

And again, page 59: "To guard against possible misap-

prehension, it is proper to state that no lien is ever implied from contracts made by the owner in person. * * * When the owner is present, and acting in his own behalf as such, the contract is presumed to be made with him on his ordinary responsibility, without a view to the vessel as a fund from which compensation is to be derived.

"We have seen that, in the case of repairs or supplies to an American vessel in a port of the State to which she belongs, no lien is implied in favor of the material man, because he is presumed to have relied on the personal responsibility of the master and owner."

And again, page 60: "The lien is given for the express purpose of *inspiring confidence abroad*, and thus enabling the master to obtain the means of pursuing his voyage and getting home in safety."

A contract for supplies at home lacks the essential elements of a maritime contract, to which a maritime lien is attached.

The contract with a seaman cannot be entered into, except in connection with a ship and a voyage.

So with the contract of affreightment. Salvage relates solely to the ship and her cargo. A contract for supplies in a foreign port, before it can become a maritime contract, or be secured by a maritime lien, must be stamped with certain characteristics. It must relate to a ship already upon a voyage; such supplies must be necessary, and suitable to the further prosecution of the voyage; and there must be no other mode of obtaining them but by a tacit or implied hypothecation of the vessel.

Not so with a contract for supplies at the home port. It is made at home, with the owner. No voyage has been undertaken; there is no urgent necessity. The supplies may be needful or convenient, or they may be the merest luxuries and superfluities.

In a word, the contract would be the same, whether the supplies were to go upon shipboard or to be sent to a man-

ufactory of locomotives. There is nothing essentially maritime about it.

And there is nothing repugnant to any provision of the Constitution of the United States in a law of the State securing the enforcement of such a contract by a statutory lien upon the vessel.

Taylor vs. Carryl, 20 How., 583.

GEO. P. STRONG,
Attorney of Defendants in Error.

Mr. Justice Clifford

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE STEAMBOAT M. BURNS, her tackle, &c., plaintiff in error,
vs.
THOS. MORRISON, and THOS. F. M. ENNIS, defendants in error.
} No. 59.

SAME,
vs.
JOS. F. REYNOLDS and JAMES AIKEN, defendants in error.
} No. 58. In error to the supreme court of the State of Missouri.

STATEMENT OF FACTS.

These are writs of error, brought under the 25th section of the judiciary act, to review the judgments of the supreme court of Missouri, rendered *in favor* of the validity and constitutionality of the boat and vessel act of that State. For its provisions, (see Revised Statutes of Missouri for 1855, vol. 1, chap. 20, p. 302, &c.

The two cases are essentially the same, and it is agreed that they shall both be disposed of in the same way. For the sake of convenience, therefore, reference will be made only to the record in the Morrison case, No, 59.

The facts of this case, so far as it is necessary to consider them, are briefly these:

1. The defendants in error (plaintiffs below) were "ship chandlers and dealers in boat stores," in the city of St. Louis. (Printed record, exhibits, pp. 4–14.)

2. The plaintiff in error, (defendant below,) the steamboat M. Burns, belonged to a *quasi*-foreign corporation, a navigation company created by the State of Tennessee, called "The St. Louis, Cairo, and Johnsonville Packet Company." (Printed record, petition, p. 3; bill of exceptions, p. 33; defendant's brief, pp. 1, 8.

3. The *cause of action* was for *necessary supplies* furnished to the said steamboat for the *use of the said boat.* (Printed record, petition, p. 3; amended answer, p. 31.)

"The evidence showed," says the bill of exceptions, "that the supplies were furnished and delivered to the boat at St. Louis, where the boat was enrolled, and where most of the owners resided; that the boat was employed in the passenger freight trade between St. Louis, in Missouri, Cairo, in Illinois, Johnsonville, in the State of Tennessee, and other ports in different States, and navigating the Ohio, Mississippi, and Tennessee rivers, *while this demand was accruing*, and when the boat was seized in this suit; that the plaintiff had charged these goods on his books *to the boat itself*, and *that he looked to the boat*, as well as its owners, for payment." (Printed record, bill of exceptions, p. 33; *Ib.*, p. 4-14; defendants brief, p. 1.

4. The proceedings in this case in the courts below were *in rem*, that is, *against the steamboat itself, as such*, and were had under the provisions of the boat and vessel act of the State of Missouri, before referred to, (Printed record, p. 3, *et passim;*) and after the steamboat had been sold at a judicial sale, as the property of the Navigation Company, and bought thereat by Heinecke, its owner at the time of these proceedings. (*Ib.*, p. 31.)

5. The jurisdiction of the State courts of Missouri, under that act, was denied on behalf of the boat, in the amended answer, and in the instructions prayed from the court, in the nature of a plea to the jurisdiction. (*Ibid*, pp. 31, 32.) This plea was overruled by the courts of St. Louis county, (*Ibid*,

pp. 30, 34, 35;) and their judgments were finally affirmed by the judgment of the supreme court of Missouri. (*Ibid*, p. 38.)

To reverse that judgment the present writ of error was brought.

ARGUMENT FOR PLAINTIFF IN ERROR.

The main question presented by the record in this case relates to the constitutionality of the boat and vessel act of the State of Missouri It is one of a *class* of State laws now numerous, which may be briefly described as "State admiralty laws." The *constitutionality* of that act has been affirmed in this case by the supreme court of the State of Missouri.

On the contrary, its constitutionality was denied there and in the courts below by our plea to their jurisdiction, and by the instructions prayed from the court. (Printed record, pp. 31, 32; *Ibid.*, 34.)

That is the general question now to be determined by this court.

I. We contend here, as we contended there, that under the Constitution and laws of the United States, the State courts of Missouri had no jurisdiction of this suit, *under the provisions of that act;* or, in other words, that the statute of Missouri is unconstitutional and void, because it undertakes to create and to confer on the courts of the State, a jurisdiction and a remedy, either *in rem* or *contrary to the methods of the common law*, "in cases of admiralty and maritime jurisdiction," the jurisdiction of which, by *methods and remedies other than those of the common law*, is vested *exclusively* in the district courts of the United States.

The establishment of this general proposition depends upon the establishment of several subordinate propositions, which we now proceed to consider.

1. Of these our first proposition is, that the *contract* for the necessary supplies furnished to the steamboat in this case was a *maritime contract.*

This is true, whether the distinction heretofore maintained between *foreign* and *domestic* vessels is well founded or not;

because, according to the modern doctrine, it is the *nature* of the contract, and not its *locality*, which determines its *maritime* character.

A *maritime* contract is a *navigational* contract, that is, *one relating to, and made in furtherance of navigation.* A contract for necessary *supplies* furnished to a vessel while engaged in navigation is therefore a *maritime* contract. This conclusion is well settled, both upon principle and authority. (See Benedict's Admiralty, §213, 256, 261; § 2, 263, 267–273; 2 Parsons on Shipping, p. 141; De Lovio *vs.* Boit, 2 Gall. R., 474, 475; The General Smith, 4 Wheat., 443; Steamboat Orleans *vs.* Phœbus, 11 Pet., U. S. R., p. 184.)

It is argued, however, by the counsel for the defendants in error, that the supplies furnished in this case were *not necessarily for the use of the boat;* that they *might* have been sent to the private residences of the owners of the boat, &c.; and that therefore there is nothing in the contract for the purchase and sale of these supplies that *necessarily partakes of the nature of a maritime contract.* (Defendant's brief, pp. 8 and 9.)

But the basis of this argument, as we have seen by the references to the record, is *directly contradicted* by the facts of the case. (See statement of facts, sec. 3, *ante* p. 2.) But if the fact were otherwise, it would destroy his case, because the lien given by the statute in question and the proceedings in the case based thereon depend for their validity upon the fact that the *supplies were furnished for the use of the boat.* (Defendant's brief, p. 2.) He is in a dilemma from which he cannot escape. The contract for supplies in this case must therefore be regarded as a "*maritime contract.*"

2. Our second proposition is this:

That if it was a "maritime contract," then it gave rise to a "case of admiralty and *maritime jurisdiction,*" which by the Constitution of the United States and by the 9th section of the judiciary act of September 24, 1789, falls within the *exclusive admiralty jurisdiction* of the district courts of the United States, *unless* the proceedings in this case, under the statute of Missouri, are *excepted* from that *exclusive* jurisdiction,

by the saving clause of the 9th section of the judiciary act.

The Constitution of the United States declares, that "the judicial power shall extend * * * to *all* cases of admiralty and maritime jurisdiction." (Art. III, sec. 2.)

The 9th section of the judicary act also provides, that "the district courts shall have, *exclusively of the courts of the several States*, cognizance of all crimes and offences, &c.; and shall *also* have *exclusive* original cognizance of *all civil* causes of admiralty and maritime jurisdiction, including all seizures, &c., *on waters which are navigable* from the sea by vessels of ten or more tons burthen, within their respective districts, *as well as upon the high seas;* saving to suitors, in all cases, the right of a common-law remedy, when the common law is competent to give it; *and shall also have exclusive original* cognizance of all seizures on land or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States; and shall also have cognizance, *concurrent with the conrts of the several States* or *the circuit courts*, as the case may be, of all causes when an alien sues for a tort only, in violation of the law of nations or a treaty of the United States; *and shall also have cognizance, concurrent, as last mentioned*, of all suits at common law when the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of $100; *and shall also have jurisdiction, exclusively of the courts of the several States*, of all suits against consuls or vice consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes, except civil causes, of admiralty and maritime jurisdiction, shall be by jury." (1 Brightly's Dig. U. S. Laws, tit. District Courts, p. 230, sec. 11.)

This section has been quoted at length, in order to show the broad and clear distinction made by it, between the cases in which the jurisdiction of the district courts is declared *to be exclusive*, and those cases in which it is declared to be "*concurrent with the courts of the several States*, or *the circuit courts, as the case may be.*"

Assuming that act of Congress to be constitutional, (which

cannot now be denied,) then it follows, that the jurisdiction of the district courts must be *exclusive*, in all cases where it is declared to be exclusive; and that the jurisdiction of all other courts, whether State or national, can be *concurrent only, in the cases named, and to the extent of the exception made from the exclusive jurisdiction of the district courts.*

Now, in regard to their exclusive jurisdiction, it is declared, they "shall *also* have *exclusive* original cognizance of *all civil causes of admiralty and maritime jurisdiction, &c.*, saving to *suitors*, in all cases, the *right of a common-law remedy*, where the *common law* is competent to give it." If this exception had not been made, it is clear that the jurisdiction of the district courts would have been *exclusive in all cases whatsoever*, of admiralty and maritime jurisdiction. But an *exception* having been made, the only question is, as to the *extent* of that exception, and whether the proceedings in this case, under the statute of Missouri, are *excepted* from that *exclusive* jurisdiction by the terms of that saving clause.

3. On this point, our third proposition is this: That the proceedings in this case, against the steamboat Burns, under the statute of Missouri, are proceedings *in rem, or contrary to the methods of proceeding at common law, and as such are not within the exception in favor of "common-law remedies,"* made to the otherwise universal and exclusive admiralty jurisdiction of the district courts of the United States, by the saving clause of the 9th section of the judiciary act:

1. Because the "remedy given" is *not* a "common-law remedy;" the remedy and the proceedings being *in rem*, and *not in personam;* and,

2. Because "the remedy given" is *given by a statute*, and *not* by *the "common law,"* or by a statute *according to the methods of the common law.*

The suit in this case, and the proceedings from beginning to end, are *in rem, against the vessel itself*, and according to the admiralty practice in proceedings *in rem.* (See printed record, p. 3, and *passim;* Benedict's Admiralty, §§ 409–411, 434, 439.)

If the statute had merely given a lien against the boat, to

be enforced by a suit *in personam* against *the owners* of the boat, and had authorized a preliminary attachment of the boat to compel their appearance to the suit, the validity of the law would have been less questionable, inasmuch as there is an obvious distinction between a lien to be enforced by proceedings *in personam*, and a lien to be enforced *in rem*. All common-law liens are of the first description, and might come within the exception in favor of common-law remedies. But nothing of this kind was done, or authorized to be done. It was, in fact, an admiralty proceeding *in rem*, and was authorized as such, under the idea of the existence of a concurrent admiralty jurisdiction *in rem*, in the State courts, growing out of the restriction of admiralty jurisdiction to tide-waters.

In support of this general proposition, it cannot be necessary to do more than to refer this court to its own decisions, in the cases of The Moses Taylor, (4 Wallace, U. S. R., p. 411;) Hines *vs.* Trevor, (*ib.*, p. 555;) The Belfast, (7 *ib.*, p. 643, &c.; and to the very able examination of this statute of Missouri by Judge Wells, in the case reported in Newberry's Admiralty Rep., 302–307.

If, therefore, it has been successfully shown that the proceedings in this case were not according to the course of the common law; that they were *in rem*, and *not in personam*, and consequently that they are not within the exception made in favor of suitors to elect "common-law remedies" in cases of admiralty and maritime jurisdiction in courts, either State or National, then it follows irresistibly, that the jurisdiction of the district court of the United States in this case was *exclusive* of all other courts, whether State or National; and, consequently, that the statute of Missouri, which authorized the proceedings in the courts below is unconstitutional and void.

II. In reply to the argument of the counsel for the defendant in error, we contend, that the immediate question here, and the only one which it is necessary for this court to determine, in order to reverse the judgment of the Supreme Court

of Missouri, is, as we have argued, one as to the *exclusive jurisdiction* of the district courts of the United States; and not, as he has argued, as to the *nature of that jurisdiction*, whether *in rem* or in *personam*. The question is *not*, as is contended by him, whether, under the system of admiralty law heretofore administered by the courts of the United States, a *maritime lien* exists for supplies furnished to a *domestic vessel*.

That is a false issue, based on *erroneous* assumptions, both in law and in fact.

1. The question, as made by him, proceeds upon this erroneous assumption *in law*, viz, that admiralty and maritime jurisdiction depends upon, and exists only in, cases of *maritime lien*. On the contrary, as is well known, admiralty jurisdiction exists in maritime cases both *in personam* and *in rem*. This is shown conclusively by the 2d and 12th admiralty rules of this court, as well as by the general admiralty law. The jurisdiction of courts of admiralty depends, not upon the fact whether the maritime law gives a *lien* against the vessel or not—or, in other words, *not on the form of the remedy*, whether its proceedings are *in rem* or only *in personam;* but upon the *maritime nature* of the subject-matter, whether it be one of contract or of tort. (1 Kent's Com., p. 425; 2 Gallison's Rep., p. 461, 462, 464, 465, 467, 474; The Belfast, 7 Wallace, U. S. R., p. 637; Benedict's Admiralty, §§ 203, 204, 254, 256, 295, and note, 362.)

The jurisdiction of admiralty courts in England was originally almost entirely *in personam*. (2 Gall. R., 462.) "It is an entire mistake that the jurisdiction of admiralty is in general limited to proceedings *in rem*." (*Ib.*, p. 454; Benedict's Admiralty, § 362.)

2. The second erroneous assumption, and one in point of fact, is, that this steamboat was a *domestic vessel*.

Admitting, for the purposes of the argument, the validity of the distinction between *foreign* and *domestic* vessels, we contend that, in point of fact, and in the sense of the admiralty law, and of the rules established by this court for determining jurisdiction, this steamboat was a *foreign vessel*, and that the

supplies were not furnished to her in her *home port*, but in a *foreign port*.

1st. The steamboat belonged, as we have seen, to the "St. Louis, Cairo, and Johnsonville Packet Company," a navigation company created by the State of Tennessee; and that it was engaged in inter-State navigation and commerce when the supplies were furnished. (See Statement of Facts, §§ 2, 3.)

2d. In the sense of the admiralty law, the States of our Union are *foreign* to each other. (2 Parsons on Shipping, p. 235, and cases there cited; 1 Newberry's Rep., 189, 309, 310, 311; 4 Wheat., 443; 2 Story's C. C. R., p. 460, 463, 467; 7 Peters' U. S. R., p. 341.

3d. For all purposes of jurisdiction, the *stockholders of a corporation* are now, by law, *imperatively presumed to be citizens of the State which created the corporation.* (Ohio & Miss. R. R. Co. *vs.* Wheeler, 1 Black's U. S. R., p. 286.

4th. The character of a vessel, as *domestic* or *foreign*, is determined, not by the place of her enrollment, but by the place of the residence of her owners. (The Golden Gate, 1 Newberry's Rep., p. 308.)

Although some of the stockholders of the company resided in St. Louis, when and where the supplies were furnished, yet, in contemplation of law, *as stockholders*, they were not the *owners* of the vessel in the maritime sense, nor citizens of Missouri, but, on the contrary, were citizens of the State of Tennessee.

We have, therefore, the case of a vessel belonging to a foreign corporation, all of whose stockholders are to be considered as citizens of Tennessee, furnished with supplies in St. Louis, Missouri, a foreign State; in other words, we have the case of a foreign vessel engaged in the inter-State, or *quasi* foreign navigation, furnished with supplies in a foreign port; in which case, unquestionably, a *maritime lien* would exist, according to the distinction made; and, of course, the district court of the United States, according to the argument made by the defendant in error, would have *exclusive* jurisdiction of the case.

But on the basis of the distinction between foreign and do-

mestic vessels, we contend, further, that, admitting the vessel to be a *domestic* vessel, the true principle of the maritime law is this: that when credit is given by material men or others to *a vessel*, whether domestic or foreign, such credit creates a maritime lien, which may be enforced *in rem* in admiralty. But the application of this principle is varied by *prima facie* presumptions, and by the facts and proofs of each case. If the vessel is what is called a *foreign* vessel, then there is a *prima facie* presumption that the credit is given to the *vessel*, rather than to her owners or to the master.

If, on the contrary, the vessel is what is called a *domestic* vessel, then there is a *prima facie* presumption that the credit is given to the *owners*, rather than to the vessel. (1 Newberry's Rep., 286, 287, 309, 310.)

But these presumptions may be controlled and overcome by conclusive proof to the contrary. (The Barque Chusan, 2 Story's C. C. R., p. 468.)

In the case of a *foreign* vessel, it may be shown that the credit was given *exclusively to the master*, in which case no lien will exist. (The Brig Nestor, 1 Sumner's C. C. R., p. 75.)

In the case of a *domestic vessel*, also, where her owners have represented her to be a *foreign* vessel, and credit has been given to her on that basis, a maritime lien will thereby be created, which may be enforced *in rem* in admiralty, (The St. Jago de Cuba, 9 Wheaton's R. 415–418; 1 Newberry's Adm. R., p. 312.) The error consists in making merely *prima facie* presumptions *imperative* and *conclusive*, thereby forbidding proofs to the contrary.

So in this case, although the vessel may be regarded as a *domestic* vessel, yet it appears from the evidence that, in point of fact, credit was given to *the vessel* as well as to the owners; (printed record, bill of exceptions, p. 33;) and if so, then, according to the principle just established, a maritime lien was thereby created, for the enforcement of which, by proceedings *in rem*, the district court of the United States had exclusive jurisdiction.

We contend, therefore, that in either aspect of this case, whether the steamboat be regarded as a *domestic* or as a *for-*

eign vessel, the district court had *exclusive* jurisdiction of the case—*in personam*, if she is regarded as a *domestic* vessel, to which no credit was given; *in rem*, if regarded as a *foreign* vessel or as a *domestic* vessel, to which credit was given: That the difference is simply *in the form of the remedy*, which does not change the fact of the exclusive jurisdiction of that court over the case, as against all other than common-law remedies and modes of procedure, in either State or National courts.

The case of The Belfast (7 Wallace's Rep., pp. 643, 645) is quoted as an authority against these views; but, in answer to the views there expressed, it is sufficient to say, that they are given in regard to a point not before the court in that case; but if it were otherwise, the views there expressed evidently relate to liens created by statute, to be enforced *in personam*, according to the methods of the common law, and do not relate, as is supposed, to liens to be enforced *in rem*, or contrary to the methods of the common law, and contrary to the saving clause of the 9th section of the judiciary act. (*Ib.*, p. 644.)

III. But if it be necessary or proper for the just determination of this case, we go further and contend, that the distinction heretofore made between foreign and domestic vessels, as to the existence or non-existence of a maritime lien against them for supplies furnished, and the like, is not well founded, and has no existence in the general maritime law of Europe: That it is the last remnant now existing of the old doctrine of the *locality* of contracts, which was itself the result of the contest for jurisdiction carried on for centuries in England between the courts of common law and the courts of admiralty; that the distinction has resulted in nothing, either in England or in this country, but in confusion, and in compelling legislation by Parliament and by the States of our Union, in fact, to abolish the distinction, by creating statutory liens to supply the place of the maritime liens existing by the maritime law, but abolished by the distinction; that this distinction was recognized in this country *before* the decisions of this court in the great cases of the Genesee Chief, and its successors, down to the late case of the steam-tug

Eagle; or, in other words, before this court had cut loose from the trammels and limitations of English admiralty jurisprudence, which trammels and limitations had been imposed on the English admiralty courts by the jealousy of the courts of common law, and which had been followed by our courts too closely and without necessity: That the time has now come for this court to assert a full, complete, and *undivided* admiralty jurisdiction, both *in rem* and *in personam*, under the Constitution and laws of the United States, *according to the general maritime law of the world*, freed from the restrictions and limitations of English admiralty jurisprudence: That the practical question now before this court is, whether we shall have *one complete and uniform system of admiralty law, in harmony with that of the civilized world*, and administered by the courts of the United States; or whether we shall have a *divided system*, such as now exists, administered partly by the courts of the United States, and partly by the State courts, in defiance of the Constitution and laws of the United States. In other words, whether we shall have multitudinous supplementary systems, as numerous and diversified as the States of the Union, existing without real necessity, and only to furnish remedies already given by the general maritime law of the world, which is also the constitutional law of the United States as a whole. On these points, see Benedict's Admiralty, (§§ 271, 272, *et passim;* Newberry's Adm. Rep., pp. 302–307.)

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